

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 210 of 1995

with

INCOME TAX REFERENCE Nos 282, 285, 286, 287, 288, 292,
294 of 1993

and

INCOME TAX REFERENCE Nos 278, 286 of 1994 and 135 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH

and

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

COMMISSIONER OF INCOME TAX

Versus

BHANUMATI AND SONS TRUST

Appearance:

1. INCOME TAX REFERENCE No. 210 of 1995, 282, 285 & 286
of 1993
MR MANISH R BHATT for Petitioner No. 1
MR KETAN H SHAH for Respondent No. 1
2. INCOME TAX REFERENCE No. 287, 288 and 292 of 1993
MRS MAUNA M BHATT for Petitioner No. 1
NOTICE SERVED for Respondent No. 1
3. INCOME TAX REFERENCE No. 294 of 1993 & 278 of 1994

MR BB NAIK for Petitioner No. 1
NOTICE SERVED for Respondent No. 1

4. INCOME TAX REFERENCE No. 286 of 1994 & 135 of 1995
MR TANVISH U BHATT for Petitioner No. 1
MR KETAN H SHAH for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 05/02/2004

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

In this group of references, the following question has been referred under Section 256(1) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for our opinion for assessment years 1983-84 and 1984-85:-

"Whether, the Appellate Tribunal is right in law and on facts in cancelling the order passed by the Commissioner of Income-tax under Section 263 of the Act wherein he had held that the income of the period i.e. 16.11.1982 to 31.3.1983 is to be taxed in the assessment year 1984-85 since the assessee was not allowed to change the previous year?"

2. The facts leading to filing of this group of references, briefly stated, are as under:-

2.1 The assesseees herein, 11 in number, were partners of CMC (India). The assesseees derived share income from the profits of the said firm. The previous year of the firm was samvat year. Consequently as far as the share income of the said firm was concerned, the previous year of the assesseees was samvat year. The firm came to be dissolved on 31.3.1983.

2.2 For the assessment year 1983-84, each of the 11 assesseees filed two returns of income - in the first return of income, the previous year shown was samvat year 2038 i.e. from 28.10.1981 to 15.11.1982, in the second return in the same assessment year, each of the assesseees had shown previous year as the period from 16.11.1982 to 31.3.1983. On the basis of the aforesaid two returns in case of each assessee, the Income-tax Officer passed two separate assessment orders on 24.1.1986. In case of the first return, the order was passed under Section 143(3);

in case of the second return, the order was passed under Section 143(3) read with Section 176 of the Act.

2.3 For the assessment year 1984-85, each of the 11 assessees filed their returns of income showing previous year as samvat year 2039 i.e. from 16.11.1982 to 4.11.1983. On the basis of these returns, assessment for each of the assessee for the assessment year 1983-84 was completed by the Inspecting Assistant Commissioner under Section 143(3) on 30.1.1987.

2.4 The Commissioner of Income-tax invoked his powers under Section 263 of the Act on the basis that since the previous year of each of the assessee was samvat year, the income of the assessee from the partnership firm for the period from 16.11.1982 to 31.3.1983 should have been taxed in the assessment year 1984-85. The CIT, therefore, cancelled the assessment order for the assessment year 1983-84 for the period from 16.11.1982 to 31.3.1983 for each of the assessee and directed the Inspecting Assistant Commissioner, Ahmedabad to revise the assessment for assessment year 1984-85 and include the income for the period 16.11.1982 to 31.3.1983 in the total income of the assessee for the assessment year 1984-85 and consequential directions for issuance of fresh demand notice and challan were also issued. Aggrieved by the above orders of the CIT under Section 263 of the Act, all the assessee went in appeal before the Income-tax Appellate Tribunal (hereinafter referred to as "the Tribunal").

2.5 After considering the provisions of Section 3(1)(f) of the Act and the fact that the firm's assessment for the period 16.11.1982 to 31.3.1983 in assessment year 1983-84 was completed and nobody had disturbed that assessment before the CIT passed the orders under Section 263 of the Act in case of the assessee and relying on the decision of the Bombay High Court in CIT Bombay City II vs. McKenzies Limited, 121 ITR 458, the Tribunal allowed the appeals and held that the assessment made by the IAC for the period from 16.11.1982 to 31.3.1983 under Section 143(3) read with Section 176 was strictly in accordance with the provisions of Section 3(1) of the Act and accordingly the Tribunal cancelled the orders passed by the CIT under Section 263 of the Act. Hence, these references at the instance of the revenue.

3. We have heard Mr BB Naik, Mr Manish R Bhatt, Mr Tanvish Bhatt and Mrs Mauna Bhatt, learned Standing Counsel for the revenue. We have also heard Mr Ketan H

Shah, learned counsel for the respondent-assesseees.

4. The learned counsel for the revenue have submitted that the Tribunal committed a serious error of law in overlooking the provisions of subsection (4) of Section 3, which provide that where an assessee has once been assessed, then, he shall not in respect of that source, or as the case may be, business or profession, be entitled to vary the meaning of the expression "previous year" as then applicable to him, except with the consent of the Income-tax Officer and upon such conditions as the ITO may think fit to impose. The learned counsel for the revenue have submitted that since samvat year was the previous year for the income of the firm and also for the assesseees' share in the income of the firm for all the earlier years and, therefore, each assessee could have filed only one return for assessment year 1983-84 relating to samvat year 2038 and only one return for assessment year 1984-85 relating to the entire samvat year 2039. However, each of the assesseees filed three returns - two returns for A.Y. 1983-84 relating to one for samvat year 2038 and another for the period from 16.11.1982 to 31.3.1983 and a separate return for A.Y. 1984-85 relating to samvat year 2039 (16.11.1982 to 4.11.1983) but the said return for samvat year 2039 did not include the assesseees' share in the income of the firm for the period from 16.11.1982 to 31.3.1983. Thus, the assesseees changed their previous year from samvat year to financial year for the period 16.11.1982 to 31.3.1983 without obtaining consent of the Income-tax Officer and without even applying for any such consent. Hence, the assessment made by the Assessing Officer for the period 16.11.1982 to 31.3.1983 in respect of each assessee was erroneous and, therefore, the Tribunal ought not to have interfered with the Commissioner's order under Section 263 directing that each assessee's income from the firm for the period 16.11.1982 to 31.3.1983 ought to have been offered in the return for the samvat year 2039 along with the other income of the assessee for that year while filing the return for assessment year 1984-85. The learned counsel further submitted that the decision of the Bombay High Court in CIT Bombay City II vs. Mckenzie's Limited, 121 ITR 458 did not consider the provisions of sub-section (4) of Section 3 and, therefore, the said decision based only on the provisions of Section 3(1)(f) was not required to be followed.

5. On the other hand, Mr Ketan H Shah, learned counsel for the respondent-assesseees has submitted that the provisions of Section 3(1)(f) clearly provide that where the assessee is a partner in a firm and the firm

has been assessed as such, then, in respect of the assessee's share in the income of the firm, the period determined as the previous year for the assessment of the income of the firm has to be treated as the previous year for the assessee's share in the income of the firm and that the said provisions are mandatory and do not leave any option either with the partner or with the Assessing Officer. Hence, there was no question of obtaining any consent of the ITO, particularly because the firm CMC (India) itself had filed two returns for the assessment year 1983-84 - one relating to samvat year 2038 and the other relating to the period 16.11.1982 to 31.3.1983. The learned counsel also relied on the fact stated in the statement of the case drawn by the Tribunal that "the Assessing Officer who was the same Officer who had assessed the firm passed two assessment orders in the case of the firm". Hence, the Tribunal was right in holding that the original assessment order was not erroneous and, therefore, the Commissioner's orders under Section 263 have rightly been set aside. The learned counsel also placed strong reliance on the following decisions:-

- (i) 121 ITR 458 (Bom) CIT vs. Mckenzie's Ltd.
- (ii) 189 ITR 687 (Cal). Biswanath Goenka vs. CIT
- (iii) 228 ITR 141 (Ker) New Ambadi Estates Pvt.Ltd vs. CIT
- (iv) 254 ITR 402 (Mad) CIT vs. Greenham Estates Pvt. Ltd.

6. Before dealing with the rival submissions, we would set out the relevant statutory provisions having a bearing on the controversy raised in this group of references.

Section 3 defines "previous year" as under:-

3(1) For the purposes of this Act, "previous year" means -

- (a) the financial year immediately preceding the assessment year; or
- (b) if the accounts of the assessee have been made up to a date within the said financial year, then, at the option of the assessee, the twelve months

ending on such date; or

(c) to (e)

(f) where the assessee is a partner
in a firm and the firm has been
assessed as such, then, in
respect of the assessee's share
in the income of the firm, the
period determined as the previous
year for the assessment of the
income of the firm; or

... ..

(2)

(3) Subject to the other provisions of this
section, an assessee may have different
previous years in respect of separate
sources of his income.

(4) Where in respect of a particular source
of income or in respect of a business or
profession newly set up, an assessee has
once exercised the option under clause
(b) or sub-clause (ii) of clause (d) or
sub-clause (i) of clause (e) of
sub-section (1) or has once been
assessed, then, he shall not, in respect
of that source, or, as the case may be,
business or profession, be entitled to
vary the meaning of the expression
"previous year" as then applicable to
him, except with the consent of the
Income-tax Officer and upon such
conditions as the Income-tax Officer may
think fit to impose.

(emphasis supplied by the revenue)

Section 4 which is the charging provision reads

as under:

Charge of income-tax.

4(1) Where any Central Act enacts that
income-tax shall be charged for any
assessment year at any rate or rates,
income-tax at that rate or those rate

shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year or previous years, as the case may be, of every person:

Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(2)

Discontinued business.

176(1). Notwithstanding anything contained in section 4, where any business or profession is discontinued in any assessment year, the income of the period from the expiry of the previous year for that assessment year upto the date of such discontinuance may, at the discretion of the Income-tax Officer, be charged to tax in that assessment year.

(2) The total income of each completed previous year or part of any previous year included in such period shall be chargeable to tax at the rate or rates in force in that assessment year, and separate assessments shall be made in respect of each such completed previous year or part of any previous year.

Revision of orders prejudicial to revenue.

263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or

cancelling the assessment and directing a fresh assessment.

(emphasis supplied)

7. Having heard the learned counsel for the parties, we find considerable substance in the submission of Mr Ketan H Shah, learned counsel for the respondent-assessee that the provisions of Section 3(1)(f) are mandatory - where the assessee is a partner in the firm and the firm has been assessed as such, the period determined as the previous year for the assessment of the income of the firm has also to be treated as the previous year for the assessee in respect of his share in the income of the firm. In the facts of the instant case, the firm - CMC (India) had samvat year as its previous year and it was accordingly so assessed all throughout. The said firm came to be dissolved on and with effect from 31.3.1983 i.e. in A.Y. 1983-84. Hence, the said firm filed its return of income for samvat year 2038 (28.10.1981 to 15.11.1982) and also for the subsequent period from 16.11.1982 to 31.3.1983. Section 4 which is the charging provision itself permits assessment in respect of the total income of the previous year or previous years of every person. Section 176 dealing with discontinuance of business or dissolution of a firm also specifically provides that notwithstanding anything contained in Section 4, where any business or profession is discontinued in any assessment year, the income of the period from the expiry of the previous year for that assessment year upto the date of such discontinuance may, at the discretion of the Income-tax Officer, be charged to tax in that assessment year. Accordingly, the Assessing Officer for the firm assessed the income of the firm for the samvat year 2038 ending on 15.11.1982 and also for subsequent period from 16.11.1982 till its dissolution on and with effect from 31.3.1983. Since the Assessing Officer exercised the discretion and accepted both the returns for assessment year 1983-84, the present group of assessee being partners of the said firm were entitled to rely and invoke the provisions of Section 3(1)(f) of the Act which provides that where the assessee is a partner in a firm and the firm has been assessed as such, then, in respect of the assessee's share in the income of the firm, the period determined as the previous year for the assessment of the income for the firm has to be treated as previous year for the assessee partner also. The Tribunal has found that the same Assessing Officer who passed the assessment orders accepting both the returns of the firm for assessment year 1983-84 also accepted the returns of the present assessee for the same assessment year.

8. The learned counsel for the revenue would, however, contend that in view of the provisions of sub-section (4) of Section 3 the assesseees were required to obtain consent of the Income-tax Officer for varying the previous year because they were already assessed for earlier assessment years on the basis of samvat year being the previous year and, therefore, they could not have filed any return for the period 16.11.1982 to 31.3.1983 by treating the financial year as the previous year. The provisions of sub-section (4) of Section 3 contemplate various situations including the provisions of clauses (b), (d) and (e) of sub-section (1) of Section 3. In the facts of the instant case, we are not concerned with any of those provisions. As far as reliance placed on the last portion of sub-section (4) of Section 3 is concerned, if the assesseees were once assessed and, therefore, they cannot vary the previous year, the said provision, if at all applicable to the partner of a firm, would apply only in so far as that person's income from sources other than income from the firm is concerned. If the firm were to continue to do business and were to change its previous year, sub-section (4) of Section 3 would certainly come into play and the permission of the ITO would be required to as already indicated earlier. In case of dissolution of a firm, sub-section (1) of Section 176, however, confers discretion upon the ITO to assess income for a part of a year ending on the date of dissolution in addition to the income of the previous year. The Assessing Officer having exercised the discretion and permitted the firm to file returns for samvat year 2038 and also for the subsequent period from 16.11.1982 to 31.3.1983, the firm was permitted to vary the previous year as contemplated by sub-section (4) of Section 3. Once the firm was allowed to file its returns for the assessment year 1983-84 in the aforesaid manner, there was no discretion either with the partners of the firm or with the Assessing Officer regarding determination of the previous year in respect of the assesseees' share in income of the firm and, therefore, in our opinion, the Tribunal was right in applying the provisions of Section 3(1)(f) and holding that the order passed by the Assessing Officer was not erroneous so as to warrant interference by the Commissioner under Section 263 of the Act.

9. The view that we have taken is also taken by other High Courts in -

(i) CIT vs. Mckenzie Ltd. 121 ITR 458 (Bom)

(ii) Biswanath Goenka vs.CIT 189 ITR 687 (Cal)

(iii) New Ambadi Estates Pvt Ltd 228 ITR 141 (Ker)
vs. CIT

(iv) CIT vs. Greenham Estates 254 ITR 402 (Mad)
Pvt. Ltd.

Since we are in agreement with the view of the four High Courts, we need not dilate on this issue any further.

10. At this stage, however, the learned counsel for the revenue submitted that even if the assessment orders passed by the Assessing authority were not erroneous on above score, at least the orders of the Assessing Officer were erroneous in so far as the assesseees were permitted to file two returns for the same assessment year. It was submitted that by permitting the assesseees to file two separate returns, lower tax rate was applied to the income for the period 16.11.1982 to 31.3.1983 and, therefore, the assessments for the assesseees were erroneous and also prejudicial to the revenue.

11. Whether the lower tax rates were applied to the income for the period 16.11.1982 to 31.3.1983 is a question of fact. In this connection, we would refer to the order of the CIT under Section 263 of the Act. The entire order proceeds on the basis that the assesseees-partners having adopted samvat year as the previous year were not entitled to file any return for the period from 16.11.1982 to 31.3.1983 and that since that period was a part of samvat year 2039, the income of the assesseees from the share in the firm's profit was required to be added to the income of each assessee for the samvat year 2039 and not assessed separately. In response to the notice under Section 263, the assesseees had filed their reply and at the hearing also contended that in making two assessments, there was no prejudice to the interest of the revenue and, therefore, the proposed action under Section 263 may be dropped. After setting out the aforesaid submissions on behalf of the assesseees, the Commissioner gave the following reasons which we set out in entirety. The order is identical in case of all the assesseees:-

"3. I have considered the submissions made on behalf of the assessee. It is well settled that when the assessee, in respect of a source of income, has exercised an option or once has been assessed, he cannot vary the previous year except with the consent of Income-tax Officer (Add.) CIT

vs. P.K.H. Chottiar 115 ITR 794 (Madras); Ramjidas Jain vs. CIT 77 ITR 260 (Punjab). If an assessee wants to change the previous year, he must obtain the consent of the Income-tax Officer. In the present case, the previous year of the assessee remains Samvat year. In view of this, the income of the assessee from the partnership firm for the period 16.11.1982 to 31.3.1983 should have been taxed in assessment year 1984-85. The assessment order for A.Y. 1983-84 passed u/s.143(3) read with Section 176 of I.T. Act is hereby cancelled. The IAC (Asstt)- III, Ahmedabad is also directed to revise the assessment for A.Y. 1984-85 and include the income for the period 16.11.1982 to 31.3.1983 in the total income of the assessee."

A bare perusal of the above reasoning and operative order of the CIT makes it clear that there is not a whisper about any prejudice having been caused to the revenue on account of the separate assessment made for the period 16.11.1982 to 31.3.1983. In this view of the matter, we have not permitted the learned counsel for the revenue to proceed on the basis as if lower tax rates were applied to the assessment for the period 16.11.1982 to 31.3.1983.

12. As regards the submission made on behalf of the revenue that if the assessee's share in the income of the firm for the period 16.11.1982 to 31.3.1983 were to be treated as part of the income for samvat year 2039, we have looked into the relevant figures of income for samvat year 2038 corresponding to assessment year 1983-84, the assessed income for the period 16.11.1982 to 31.3.1983 (ranging between Rs.20,000 and 30,000 in each case) also in respect of assessment year 1983-84 and the income of the assessee for samvat year 2039 corresponding to assessment year 1984-85. On perusal of the figures, we find that income of each of the assessee's for samvat year 2038 was higher than income for the samvat year 2039 with the result that by taking out the income for the period 16.11.1982 to 31.3.1983 from assessment year 1983-84 and adding it to the income in samvat year 2039 corresponding to the assessment year 1984-85, the assessee's would not have been required to pay tax on a higher rate. In this view of the matter also, there is no question of any prejudice having been caused to the revenue.

13. In view of the above discussion, we are of the view that the Tribunal was right in cancelling the order

passed by the Commissioner of Income-tax under Section 263 of the Act wherein he had held that the income for the period 16.11.1982 to 31.3.1983 is to be taxed in the assessment year 1984-85.

We accordingly, answer the question in the affirmative i.e. in favour of the assesseees and against the revenue.

14. The References accordingly stand disposed of.

(M.S. SHAH, J.)

(A.M.KAPADIA, J.)

zgs/-